

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 199 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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ERUCHSHA HORMASJI PATEL

Versus

BAI LACHHI DHAKAL ALIAS DOSABHAI & OTHERS

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Appearance :

MR ARUN H MEHTA for Appellant.

MR JB PARDIWALA for Respondents NO.1-6.

Respondents No.7 served

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 19/07/2007

ORAL JUDGMENT

The original petitioner has filed the present Second Appeal being aggrieved by the judgment and decree passed by the learned Assistant Judge, Valsad in Regular Civil Appeal No. 117 of 1994 confirming the judgment and decree passed by the learned Civil Judge [Junior Division], 3rd Court, Valsad at Navsari in Regular Civil Suit No. 105 of 1983.

Short facts of the case are, deceased Dosabhai was a Parsi by caste. It is the say of the defendants that Lachhiben had married with deceased Dosabhai before several years, and was residing together and out of that wedlock, defendants No. 2 to 7 came to be born. Subsequently, in the year 1960, the said Dosabhai married one Shaherbanu and out of this wedlock, two daughters were born. One daughter, who married a person belonging to Muslim community died. Shaherbanu and daughter Villoo executed a registered sale deed in favour of the plaintiff and it is the say of the plaintiff that he has thus become the owner of the suit property. It is further the say of the plaintiff that defendants No.1 to 7, Bai Lachhi and her children, are trying to establish their right over the suit property. The plaintiff has therefore filed the present suit for a declaration that he is the owner and in possession of the sit property and defendants No. 1 to 7 are not the heirs of deceased Dosabhai and has also prayed for an injunction restraining the defendants from interfering with the possession of the suit property. The learned trial Court dismissed the suit against which the original plaintiff preferred an appeal, which also came to be dismissed. The original plaintiff has, therefore preferred the present Second Appeal.

While admitting the Second Appeal, the following substantial questions of law were framed:

1. Whether in the facts and circumstances of the case when the marriage of deceased Dosabhai with his legally wedded wife Shaherbanu was subsisting under the Parsi Marriage and Divorce Act, 1936 and when the legally wedded wife Shaherbanu has executed registered sale deed in favour of the appellant plaintiff, in view of Sections 3 and 4 of the Parsi Marriage and Divorce Act, 1936, it was permissible for the lower appellate Court to raise the presumption of valid marriage between deceased Dosabhai and Bai Lachhi simply based on the alleged factum of two persons having lived together for a long time?
2. Whether the decision of the Apex Court in the case of S.P.S. BALASUBRAMANIAM v. SURUTTAYAN alias PADAYACHI AND OTHERS reported in AIR 1992 SC 756 and other decisions referred to by the lower appellate court will apply and operate in a fact situation where by statutory prohibition enacted by Section 4 of the said Act, second marriage is prohibited or in other words whether a presumption of valid marriage could arise when such presumption is contrary to statutory provisions of Section 4 of the said Act?

I have heard Mr. Arun H. Mehta for the appellant and Mr. J.B. Pardiwala for the respondents. I have also gone through the records of the matter.

Mr. Mehta, learned advocate for the appellant submitted that though the first marriage with defendant No.1 was prior in time, in view of the fact that the second marriage in 1960 was as per the Parsi Marriage and Divorce Act, 1936 [hereinafter referred to as the Act], the second marriage is valid and the first marriage is invalid. Mr. Mehta further submitted that the courts below have drawn a presumption of the marriage between Dosabhai and 1st defendant from long cohabitation and birth of children and some documents where name of Dosabhai follows the name of concerned defendant. However, Mr. Mehta submitted that this presumption, in the facts of the case, is rebutted by the following facts and circumstances:

- (1). The defendants admit that Saherbanu was legally wedded wife of Dosabhai and was married according to Parsi rites.
- (2). Two daughters, Bakhtawar and Pilloo, born out of the said wedlock, are legitimate children.
- (3). Defendant No.1 was not examined as witness in Court.
- (4). No evidence of marriage ceremony with defendant No.1 according to Parsi Law or any other law was produced.
- (5). The lower courts ignored provisions of sections 3 and 4 of the Act and relevant law before the said Act.
- (6). There cannot be a presumption against express provisions of law.
- (7). In view of the decisions of Supreme Court, the presumption arising out of long stay stand rebutted in view of what is stated above.

As regards suit by a co-owner, learned advocate for

the appellant has relied on the judgments reported in AIR 1977 SC 1599 and AIR 1988 PAT 58 [F.B].

Mr. Mehta, learned counsel for the appellant has drawn my attention to sections 3 and 4 of the Act, which reads as under:

3.(i). Requisites to validity of Parsi marriages.-

No marriage shall be valid if-

- (a). the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or
- (b). such marriage is not solemnized according to the Parsi form of ceremony called 'Ashirvad' by a priest in the presence of two Parsi witnesses other than such priest; or
- (c). in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not), who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.

(2). Notwithstanding that a marriage is invalid under any of the provisions of sub-section (1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.

4. Remarriage when unlawful.- (1). No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the lifetime of his or her wife or husband, whether a Parsi or not, except after his or her lawful divorce from such wife or

husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved, and, if the marriage was contracted with such wife or husband under the Parsi Marriage and Divorce Act, 1865, or under this Act, except after a divorce, declaration or dissolution as aforesaid under either of the said Acts.

(2). Every marriage contracted contrary to the provisions of sub-section (1) shall be void.

Relying on the aforesaid provisions, Mr. Mehta submitted that the marriage contrary to Parsi law is invalid. However, learned counsel for the appellant was not in a position to point out as to how any breach of section 3 is committed. Moreover, in view of sub-section (2) of section 3 of the Act, Mr. Mehta is also not in a position to point out that the children born out of the wedlock between deceased Dosabhai and defendant No.1 have no right in the property of deceased Dosabhai.

That apart, the second marriage with Shaherbanu was in the year 1960 but it is an admitted position that much before that he had married defendant No.1 and children were born out of the said wedlock too. In that view of the matter also, the present appellant has no rights whatsoever in the disputed property.

Mr. Pardiwala, learned advocate for the respondents submitted that there is a concurrent finding by the courts below that the disputed property is in possession of the present respondents. The prayer in the suit, however, was for a declaration and injunction and the said prayer was not amended although the plaintiff was

not in possession of the suit property. In this regard, learned advocate Mr. Pardiwala relied on of decision of the Honourable Supreme Court in the case of VINAY KRISHNA vs. KESHAV CHANDRA reported in AIR 1993 SC 957 and RAM SARAN vs. GANGA DEVI reported in AIR 1972 SC 2685 and submitted that when the defendants are in possession of the suit property and the plaintiff in his suit does not seek possession of the property but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable.

In paragraph 6 of the judgment, the lower appellate Court, relying on various judgments, more particularly paragraph 20 of the judgment in case of Badriprasad reported in **AIR 1978 SC 1557**, has drawn presumption that a valid marriage has taken place between deceased Dosabhai and defendant No.1. The lower appellate court has further held that the plaintiff is also not entitled to get the relief of declaration on the basis of the sale deed executed only by Shaherbanu and her daughter.

In the result, the plaintiff has merely prayed for a declaration and has not amended the prayer in the suit seeking possession of the property. The suit itself is not maintainable. That apart, there is a concurrent finding of fact arrived at by two courts below, and having heard the learned advocates for the parties and having perused the records of the case, this Court is of the view that the courts below have rightly arrived at the said finding, and no interference is called for.

The appeal is dismissed. No order as to costs.

[K.S. JHAVERI, J.]

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